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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 228.

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JAMES H. McKENNEY,
Clerk.

THE UNITED STATES,

Petitioner,

vs.

EMIL DIECKERHOFF ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, Petitioner, vs. EMIL DIECKERHOFF, *et al*, Respondents.	No. 228.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Brief for the Respondents.

The facts in this case seem to be fairly and fully stated in the brief for the United States, and there is nothing special to add to them. Attention is called to the fact admitted at the bottom of page 3 of the Government's brief that the respondents demurred to the complaint herein, whereupon it was, we insist, the duty of the Court to determine how much was due according to equity under the provisions of Section 961 of the Revised Statutes cited at the bottom of page 15 of the petitioner's brief.

Much of the petitioner's brief is devoted to a discussion of whether the respondents can set up that

the bond was not in accordance with the statute, and whether the United States had a right to exact a bond not in strict conformity with the statute. These questions need not be discussed here. Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the Collector to enforce it in its form as made. For the purposes of this argument we concede that it was a voluntary bond enforceable according to its terms, and that there has been a breach.

The only question in the case is what does the bond provide. What did the parties to it agree to? What was the obligation they voluntarily assumed? This, we insist, is to be determined primarily from the language of the bond itself, the statute to be resorted to only so far as it may throw light upon any question left in doubt by the terms of the bond itself. Our contention is that the parties agreed only to have certain amounts fixed as penalties to mark the maximum amount which the United States could recover from them, but that it was within the contemplation of all parties at the time of the execution of the bond that the United States could recover for nothing but actual damage sustained by it, to be alleged and proved.

In considering this question it is certainly proper for the Court to take into consideration the fact that although this statute was passed nearly three quarters of a century ago, it has not been the practice to attempt to enforce these penalties. It is not, of course, contended that any legal estoppel exists against the Government by reason of this long continued construction of a statute, but it is most respectfully insisted that the fact that claims of this

character have not been made before is entitled to considerable weight in determining any doubtful questions when they are made at this late day. Not only has it been the disposition of all courts to refuse to enforce penalties in cases where those nominally entitled to enforce them have suffered no damages, but in the law of the United States this disposition is re-enforced by Section 961 of the Revised Statutes, which provides as follows:

> "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the Court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

The Circuit Court upon the hearing of the demurrer to the complaint herein should have proceeded under this statute, and as it would then have appeared (as it has since appeared by the concession in open court of the appellants in error) that they had suffered no damage or at least could prove none, this would have put an end to the litigation. Such was the view of Judge Wheeler when, in the case of U. S. *v.* Duys (112 Fed. Rep., 875) in a suit on a warehouse bond, he sustained a demurrer to the complaint.

The question whether a provision in a contract for the payment of money on the breach of an agreement shall be treated as a penalty or as liquidated damages is one which has occupied the attention of the courts in innumerable cases, and a brief might easily devote 20 pages simply to the citation of authorities in the courts of England, and of the United States Federal Courts and the courts of the several

States. But I do not deem it necessary to extend this brief or take up the time of the Court for any such purpose. It seems to me that the question whether the Government can recover in this case is a simple one under the authorities in the several Courts, and to a few of those which seem to me to lay down the correct principles applicable to this case, I shall confine myself.

In the case of Taylor *vs.* Sandiford (7 Wheat., 11), Chief Justice Marshall said:

> "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting party. *Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention.*"

Let us apply this principle to the case at bar. The bond signed by these parties provides as follows:

> "The penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid."

The proof in the case shows that these bonds are drawn up by the Collector and are contained in a book kept in his office (fol. 73). It is quite evident that the Government officer who drew the bond considered this stipulated sum as a penalty, and it

is equally clear that the parties who signed the bond considered it to be exactly what the Collector had chosen to call it.

In the case of Van Buren *v.* Digges (11 How., 461), the Supreme Court said:

> "The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. *Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty.*"

See also,

Watts *v.* Connors, 115 U. S., 353.
Bignall *v.* Gould, 119 U. S., 495.
Chicago House Wrecking Co. *vs.* U. S. 106 Fed. Rep., 385.
Manufacturing Co. *v.* Camp. 65 Fed. Rep., 794.

The statute providing for these bonds says that in case of a failure to return the packages, the bond shall be forfeited. The parties who signed this bond said that the penalty should be double the value of each importation. Neither the statute nor the bond contains any reference to liquidated damages.

But laying aside for the time being the language of the bond or of the statute, let us consider what is the object of the statute and of the bond. If all imported merchandise were retained in the custody of the Collector until after the examina-

tion of the merchandise and invoice were fully completed, the Collector would have a lien on the goods for his duties, and the actual custody of the goods, to make seizure of them in case there were any fraudulent undervaluation or other attempt to defraud the revenue. If the duties were not paid, in the absence of fraud, the goods could be sold, the duties and expenses satisfied, and the balance paid over to the importer. If the goods were forfeitable for fraud, the United States could proceed *in rem*, obtain a judgment of confiscation and sell the goods. In the one case the Government's claim for duties would be fully satisfied. In the other, it would have recovered 100 per cent. of the value of the importation. Shall it be held that the bond was intended to give the Government more than this? Apparently, both the counsel for the Government, and the Circuit Court, could not go to the extent of holding that it did, and so the Court tried to substitute a more equitable contract, which, however, the parties never made. If the bond is to be enforced in accordance with its terms, irrespective of any loss or damage sustained by the United States, then a mere failure to return a package or even the inadvertent opening of it without a permit in writing, although it were immediately nailed up and returned intact to the Collector, would entitle the Government, even in the absence of any fraud, to recover either 180 or 200 per cent. of the value of the importation. For, as the Government retains 10 per cent. of the merchandise and delivers 90 per cent., and the penalty is double the value, if what the collector endorses on the bond is the value of the 90 per cent. delivered, an enforcement of the penalty would give the Government 180 per cent. of the value of the importation. And if (which is apparently the case) the total value of the importation is endorsed on the bond, the enforcement of the penalty would give the Government 200 per cent.

of the value of the importation, notwithstanding the importation was absolutely honest, and no fraud, irregularity or damage was either alleged or proved. Is there anything in this writing which is now before the Court for construction which sanctions the belief that either the party who took this bond or the parties who signed it ever contemplated any such result? We submit there is not.

It is sought by the Government to bring this case within a certain class of exceptions to the rule that the penal sum named in a bond shall be treated as a penalty and that the plaintiff shall recover only the amount of actual damage. One of these exceptions is a class of cases where the courts have treated the amounts stipulated in the bonds as statutory penalties for the non-performance of statutory duties. The leading case on this subject is Clark *vs.* Barnard, 108 U. S., 436. In that case a railroad company had received permission in the State of Rhode Island to construct an extension of their line within the State. The act granting the authority contained the following provision:

> "This act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the Governor of this State in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January A. D., 1872."

The condition was not complied with and suit was brought for the amount of the bond. This Court held that the State was entitled to recover on two grounds: First, that it was not intended by the parties that the bond should be for an indemnity against any loss or damage expected to be suffered by the State in the event of the railroad company

failing to build the railroad as required, it being plain that no such loss or damage could possibly have arisen. This ground is clearly inapplicable to the case at bar, as it is plain that damage might and could arise to the United States if merchandise were allowed to go into consumption without examination or appraisal, and that it was the intention of the bond to guard against such loss. The second ground upon which this Court based its decision is thus stated by the Court:

> "In the second place, we think, that the sum named in the statute is imposed by it as a statutory penalty for the non-performance of a statutory duty. The obligation required is that the railroad company shall give a bond, with satisfactory security, that they will obey the law, that they will complete their road as required by it. The language evidently means that, in case they fail to do so, they shall forfeit and pay the sum named; and, in order to insure its payment, additional parties to the bond, as sureties, are required. It is admitted that if it does not mean this it does not mean anything, and we have already said that we are not at liberty to adopt that alternative."

It will be noted that in this case the sum named in the bond was named in the statute, and, in view of the fact referred to by the Court that no damage susceptible of proof could be sustained by the State, it was clear that, if the statute did not mean that the sum named should be paid for the breach of duty, it did not mean anything. In the case at bar there is no sum named in the statute, nor any basis suggested for the mathematical determination of the sum to be stipulated in the bond. The bond is to be "for double the estimated value of the merchandise." The estimation is made by the collector. To apply the rule of Clark *vs.* Barnard to these ten-day bonds would be to hold that the

collector himself might in each instance fix the amount of a penalty which should be inflicted upon the importers in case for any reason, except the act of God or the public enemy, they fail to comply with the conditions of the bond. This Court clearly did not intend to lay down any such rule.

Another authority relied upon by the United States is that of The S. Oteri, 67 Federal Reporter, page 146, in which the United States was allowed to recover the penalty of an exportation bond. In that case the Court held that the bond in question was one in no respect given to secure the payment of duties, but was one authorized and required by the statute for the purpose of preventing fraud on the revenues. It had been proven upon the trial that the obligors of the bond had, in fact, committed a fraud upon the revenues and had attempted to deceive the customs officers. The revenues had been, in fact, defrauded, and the Court said: "We are of opinion that the said bond is not one in which equity, *under the facts admitted*, can relieve the obligors from the full penalty stipulated."

In the case at bar there is no allegation that the United States was defrauded, or that any attempt was made to defraud it by anybody, or that anybody had been guilty of any intentional wrongdoing, or even of any neglect or carelessness.

The attention of the Court is especially invited to the case of U. S. *vs.* Cutajar, 59 Fed. Rep., 1000. In that case the United States sued for the full penalty of a bond given to produce a certified invoice under Section 4 of the Customs Administrative Act. They were allowed to recover under the terms of a bond (which expressly stipulated therefor) the balance of duties unpaid, but were defeated in their attempt to recover the full penalty in the bond. Judge Brown said:

> "In the next place, the statute does not prescribe the amount of the bond. *It leaves*

> *it to be regulated by the Secretary of the Treasury.* I think it is hardly consistent with the general purpose of such legislation or a proper construction of the law, to suppose that the Secretary of the Treasury was intended to fix, by a mere arbitrary regulation, a positive penalty as liquidated damages which the citizen must pay because an authenticated invoice might not be produced within a specified time. In this case the bond itself is not even in exact compliance with the regulation. Its amount is in excess of the regulation. The bond was made greater than 'double of the duties,' as estimated, without the authority of the collector, and as a mere matter of convenience in practice by the clerk who administered this business to take the nearest even hundred. It cannot be that the power to inflict a penalty as such, or to fix liquidated damages in that manner, irrespective of what might be the government's loss, could be sustained. But it is reasonable and consistent enough if *the amount thus fixed for the bond is recorded merely as a limit, and for the purpose only of securing to the government the payment of what shall eventually prove to be due to it.*"

This case was taken on appeal to the Circuit Court of Appeals, whose decision will be found in 67 Fed. Rep., 530. From the opinion of Judge Lacombe we quote the following:

> "The case at bar is not within the authorities cited on the brief of plaintiffs in error" (and the reference to the statement of facts in the report of the case below, 59 Fed. Rep., will show that all the authorities here cited were relied on by appellants in that case), "which hold that where the sum named in the bond is a *fixed penalty imposed by law* as a punishment for a breach of duty enjoined by law, the Court will not undertake to alter or refuse the penalty which *the Legislature has fixed* for the non-performance of a statutory duty. *Congress has not fixed the penalty.*"

These remarks are entirely applicable to the case at bar. In Section 2899, Congress has not fixed the penalty. There is no penalty fixed by law. The penalty of the bond is fixed by the collector and was intended to be only a maximum sum to limit the liability of the obligors, the actual sum to be recovered from them being only the amount of damage sustained by the Government.

In the case of U. S. *vs.* Hatch, 1 Paine, 336, and U. S. *vs.* Montell, Campbell's Reports, 47, the amount of the penalty was fixed in the statute, and it was very properly held by the Court that it amounted to a statutory penalty just as though the statute had said that any one who violated it should be subject to a penalty of $400, without providing for any bond at all.

In the case of U. S. *vs.* Pingree, 1 Spr., 339, the language of the statute was:

> "And for a failure to transport and deliver within the time limited any such bonded goods, wares and merchandise to the collector at the designated port, there shall be levied and collected an additional duty of 100 per cent., which additional duty shall be secured by such bond."

It seems hardly necessary to point out the distinction between a statute which says that an additional duty of 100 per cent. shall be levied and collected, to be secured by a bond, and a statute which provides for a bond indeterminate in amount to be fixed by a Government officer, and says that in case of breach the bond shall be forfeited. The Court expressly called attention to the difference between this language and that of the Act of 1846 (9 Stat., 53), which provided that a bond should be given for double the duties, and said: "Under this Act [1846] if the goods were not rewarehoused *the utmost the government could recover was double the duties,*

and as the bond could be chancered the Court could direct a sum to be paid less than the penalty."

The suggestion was made upon the argument below that the object of Congress in providing for this bond was not compensation, but punishment. We submit that such a view would be in the highest degree unreasonable. Statutes providing punishments do not leave the amount of the punishment to be determined by subordinate executive officers. The determination of a degree and form of punishment for violation of law is a judicial function, and even in the hands of judges is limited by the terms of the statute within certain maximum and minimum limits. Section 6 of the Customs Administrative Act provides that for making a false declaration on entry an importer may be fined $5,000. Section 9 of the same act provides that, for presenting a false and fraudulent invoice or paper, or making fraudulent entry, or being guilty of any willful act by which the United States may be defrauded, the guilty party may be fined $5,000. To view the statute now under consideration as a punitive statute would make the degree of punishment dependent not upon the degree of guilt, but upon the size of the importation. In the case of the disposal of goods willfully, with intent to prevent examination at the Custom House, the amount recovered as punishment might be $200 if the value of the importation was one-half that sum; whereas, in the case of the accidental opening of a single package out of an importation worth $100,000, the punishment might be a forfeiture or recovery of $200,000. To give the statute such a construction as this would be to work an injustice which would shock the moral sense.

It will be noted that in the matter of giving this bond, the entry is treated as a whole. Large importing dry-goods houses might bring in on one entry 100 cases of merchandise of widely different

kinds. Some cases might contain pins, others, embroideries; others, silks; some, dress goods; some, laces; some, fancy articles. Let us suppose that, out of the whole 100 cases, five cases contained embroideries. After examining one of these which had been sent to the Public Stores, demand is made for the other four cases of embroideries. If the importer is unable to furnish these or any one of them he is under the Government's construction to forfeit double the value of the whole importation, 95 per cent. of which is of an entirely distinct and different class of merchandise from that which he has been called upon to deliver up. To suppose that the persons who became sureties on these bonds ever contemplated assuming any such liability as this is, we submit, a most extravagant hypothesis. No such construction should be given to a law if there is the slightest possibility of giving it any other construction.

The statute under which these bonds are given was enacted in 1830. The volume of importation at that time as compared with the present was comparatively insignificant. It was doubtless then practicable for the Appraiser to return invoices within two or three days of the time of entry. At the present time ten days would be considered a short time for the return of an invoice, and in many instances they are held up for weeks and months. To subject parties to a forfeiture of double the value of their merchandise, if during this long period a single case has been opened, notwithstanding no one has been damaged thereby, would be to inflict a blow upon commerce which would stagger the community. Note that the bond is to keep the goods for ten days after the appraiser returns the invoice. Suppose the entry should be liquidated promptly upon the return of the invoice, so that the whole transaction is practically closed, and that four or five days after the liquidation a

demand is made for a package which cannot be delivered, is it not monstrous to suggest that this would warrant a forfeiture of double the value of the importation? Yet, if the Government is correct in its contention here and a suit were brought to recover the full penalty of the bond any suggestions as to inequity might be met by the answer of Shylock, "Give me my bond, give me my pound of flesh." It seems almost incredible that such a claim should be seriously made in the year 1904 in a court of justice.

There is no force in the suggestion that the delivery of the goods to the importer deprived the Government of all evidence by which it could establish the amount of damage it had sustained. Litigations involving thousands of dollars are decided in the Circuit Court almost every day where the kind, character and quantiy of merchandise contained in packages is established by evidence long after the goods have been consumed. The cases containing these goods are only one kind of evidence by which to establish the character of the goods. Many cases will be found in the books where the character of imported merchandise in suits by the Government for forfeiture or duties has been established by the testimony of informers and by the testimony of foreign shippers, by documentary evidence and in many other ways. It may be harder to get this other kind of evidence than it would be to open the cases if they could be produced, but this is no reason for giving a harsh and unreasonable construction to a statute seventy years after its enactment. If punishment is the end to be sought and there is any evidence to indicate that the cases were fraudulently packed or invoiced, ample punishment can be secured against the guilty parties under Section 9 of the Customs Administrative Act or Section 3082 of the Revised Statutes or other provisions of law, without im-

posing harsh and unconscionable punishment upon innocent parties under a novel, strained and unreasonable construction of Section 2899.

The judgment should be affirmed.

Dated New York, April 7th, 1906.

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Supreme Court of the United States.

No. 228.—October Term, 1905.

The United States, Petitioner, vs. Emil Dieckerhoff et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 14, 1906.]

Mr. Justice Day delivered the opinion of the Court.

An action was brought in the Circuit Court to recover upon a certain redelivery bond purporting to be executed under cover of section 2899, Rev. Stat. U. S. The respondents, principals on the bond, were partners, as Dieckerhoff, Raffloer & Co. Achelis and Boker executed the bond as sureties. On January 13, 1897, Dieckerhoff, Raffloer & Co. imported by the steamship Bovic certain merchandise which was entered in the New York custom house and consisted of seven packages. These were described in two invoices and are numbered 417 to 421, 983, 984. Package No. 418 was designated by the collector to be sent to the public stores for examination and appraisal; the others were turned over to the importer under section 2899, Rev. Stat. The estimated value of the entire importation, $1,522, was indorsed on the bond. Within ten days after the examination and appraisal of package No. 418 the collector ordered respondents to return package No. 420. This package was not returned. Thereupon suit was instituted upon the bond. A demurrer to the complaint was overruled, and an answer was filed denying breach of the bond and also that the United States had sustained any actual damages. At the trial a customs clerk testified as to the value of package No. 420, estimated from the invoice, that it was $184.56; that the indorsement on the bond was: "Vessel, Bovic; where from, Liverpool; amount, $1,522." It was conceded that the collector had called for the return of the package, that the same was not returned and respondents offered no evidence. Counsel for the United States conceded that there was no proof in the case that the United States had suffered actual damage, and that they could make no such proof. Over the respondents' request for a verdict in their favor the Circuit Court directed a verdict in favor of the Government for $369.12, being twice the estimated value of the unreturned package. The Circuit Court of Appeals reversed this judgment.

The sections of the Revised Statutes pertinent to be considered are: